AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, LEONARDO FRANQUI, am the petitioner in the above-entitled case. In support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

I further swear that the responses I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

Supreme Court, U.S.
FILED
FEB 18 1998
CLERK

(2)

1. Are you presently employed? Yes ___ No ✓
   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

97-1203

   b. If the answer is no, state the date of your last employment and the amount of salary or wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? Yes ___ No ✓

   a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or have a checking or savings account? Yes ___ No ✓

   a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing) Yes ___ No ✓

   a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

I declare under penalty of perjury that the foregoing is true and correct.
Executed on: 1-28, 1998

(Signature)

Sworn and Subscribed before me this 28 of Jan 1998

Notary

Richard U. Tucker, Sr.
MY COMMISSION # CC603761 EXPIRES
February 9, 2001
BONDED THRU TROY FAIN INSURANCE, INC.

20 pp

No. 97-1203

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

STATE OF FLORIDA,

PETITIONER

v.

LEONARDO FRANQUI,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF FLORIDA

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Supreme Court of Florida correctly held that a codefendant's confession implicating the Respondent lacked sufficient indicia of reliability to justify its admission as direct evidence against the Respondent.

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STATEMENT OF THE CASE

On December 6, 1991, several men confronted Danilo Cabanas, Sr., his son, Danilo Cabanas, Jr., and their friend, Raul Lopez, as they drove from the bank where Cabanas, Sr. had withdrawn money to operate his check cashing business. During the ensuing gunfight, Lopez was mortally wounded.

On the day in question, the Cabanases were riding together in their Chevrolet Blazer. Cabanas, Jr., was driving. Lopez was following in his pick-up truck. At an intersection not far from the bank, Cabanas, Jr., slowed his vehicle because another car - a Chevrolet Suburban - had stopped in the roadway. A second Chevrolet Suburban then passed on his left, preventing him from passing the first Suburban.

Ultimately, the two occupants of the first Suburban exited their vehicle and began shooting at the Cabanases. Cabanas, Sr,. returned their fire. The Cabanases were unsure whether the occupant of the second Suburban was armed. After the shooting stopped and the Suburbans departed, the Cabanases found Lopez lying behind his truck. The fatal bullet was fired from a .357 revolver.

On January 18, 1992, Respondent Leonardo Franqui was questioned by the police about this incident. Franqui initially denied any involvement. Subsequently, however, he admitted to the interrogating officers that he had driven the second Suburban.

Specifically, Franqui claimed that he was advised of the Cabanases' activities by Fernando Fernandez. He then described how he and codefendants Pablo Abreu and Pablo San Martin stole the two Suburbans used in the incident. He further explained that on the day in question, Abreu's van was left on a nearby highway as a "getaway car" and that he, Abreu and San Martin had driven to the bank in the Suburbans. Franqui admitted having a .357 or .38 caliber revolver. The others carried .9mm firearms.

When the Cabanases left the bank, Abreu and San Martin, who were together in one Suburban, drove in front of them. Franqui trailed in the second Suburban. At the intersection in question, the first Suburban stopped. Franqui then drove alongside the Cabanases' vehicle, effectively blocking the roadway. When Abreu and San Martin exited the first Suburban, gunfire ensued.

Franqui further claimed that while shots were being exchanged between his codefendants and the Cabanases, Lopez' truck "rammed" into the rear of the Cabanases' Blazer. Franqui later admitted being surprised by Lopez' appearance there. He stated that Lopez fired at him and that he "ducked" and fired once in return. The robbery attempt having been thwarted, he, Abreu and San Martin then left the area. The Suburbans were abandoned at the site where Abreu's van had been left.

San Martin was also questioned by the police on January 18, 1992. Initially, the interrogating detective advised him that the detective had received information implicating San Martin in the charged offenses from "others". San Martin then admitted stealing the Suburbans, riding with Abreu in the first Suburban while Franqui drove the other and firing at the Cabanases. He claimed to have seen Lopez arrive in his truck. He could not say, however, whether Franqui fired any shots during the incident.

On February 18, 1992, an Indictment was returned in the Circuit Court for Dade County, Florida charging Franqui, Abreu and San Martin with first degree murder of Lopez, two counts of attempted first degree murder, armed robbery with a firearm, two counts of grand theft and unlawful possession of a firearm during a criminal offense.

Prior to trial, Franqui sought a severance of his trial from that of his codefendants,[1] claiming that admission of their post-arrest statements at a joint trial would violate his Sixth Amendment right of confrontation. In denying this request, the trial court found that severance was not warranted as, due to their "interlocking" nature, each statement was sufficiently reliable to justify its admission as evidence against the

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[1] . Abreu had also confessed to his involvement in the charged incident. He pleaded guilty prior to trial.

other defendants.

A jury trial in this matter began on September 18, 1993. During trial, the Petitioner, citing this Court's cases construing the Sixth Amendment, repeatedly objected to the introduction of San Martin's post-arrest statements.[2] Those objections were overruled.

At trial, the prosecution introduced the Cabanases' testimony, the defendants' statements and physical evidence. Notably, neither Cabanas could identify Franqui as one of their assailants. Nor did the State introduce fingerprint evidence linking the Respondent to the incident. Finally, during closing argument, defense counsel outlined for the jury the numerous inconsistencies between Franqui's statement and the prosecution's other evidence. The jury, however, convicted both defendants as charged. Ultimately, the jury recommended -and the trial court imposed- a sentence of death.

On June 26, 1997, the Florida Supreme Court issued an opinion affirming Franqui's convictions and sentences except for the convictions for attempted first

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[2]. On January 20, 1992, San Martin had given a second statement to the police concerning his disposal of the guns used in the incident.

degree murder.[3] Although the court decided that San Martin's statement was improperly introduced as evidence against Franqui,[4] a majority found that that error was harmless. A request for rehearing was subsequently denied. Franqui is presently incarcerated on Florida's "death row."

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[3]. Franqui v. State, 699 So.2d 1312 (Fla. 1997).

[4]. The court held that the admission of that statement violated the "United States Constitution." Id. at 1315.

THE SUPREME COURT OF FLORIDA CORRECTLY FOUND THAT A CODEFENDANT'S CONFESSION IMPLICATING THE RESPONDENT WAS IMPROPERLY ADMITTED AGAINST THE RESPONDENT AT TRIAL AS THAT CONFESSION LACKED SUFFICIENT INDICIA OF TRUSTWORTHINESS TO OVERCOME THE PRESUMPTIVE UNRELIABILITY OF SUCH STATEMENTS

A) Those portions of the codefendant's statement that inculpated the Respondent were not genuinely statements against penal interest.

The State of Florida ("State") has argued that statements against penal interest comprise a "firmly rooted" hearsay exception and that codefendant Pablo San Martin's post-arrest statement inculpating both himself and Respondent Leonardo Franqui was thus admissible against Franqui. The Court need not address that issue, however, as San Martin's confession was not truly a statement against penal interest.

Statements admitted pursuant to a "firmly rooted" hearsay exception do not violate the Confrontation Clause of the Sixth Amendment because they "are so trustworthy that adversarial testing would add little to their reliability." Idaho v. Wright, 497 U.S. 805, 821 (1990). This Court, however, has recognized that "a

codefendant's confession is presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well be the product of the codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another." Lee v. Illinois, 476 U.S. 530,545 (1986). Due to this inherent unreliability, the Court has further found that the Federal Rules of Evidence do "not allow admission of non-self- inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory." Williamson v. United States, 512 U.S. 594, 600-1 (1994). Instead, a codefendant's confession is admissible against an accused only if it is "truly self-inculpatory." Id. at 603.

The federal courts of appeals that have construed Lee and Williamson have uniformly viewed codefendants' confessions with heightened scrutiny. For example, the Second Circuit has found that a codefendant's statement "result[ing] from a formal police interrogation" is inadmissible unless the defendant adopts or authorizes the statement. Latine v. Mann, 25 F.3d 1162, 1166-7 (2nd Cir. 1994). Similarly, the Fifth Circuit has "categorical[ly]" rejected the admission of "third party accusations made in ex parte confessions to law enforcement or prosecutorial authorities [.]" United States v. Flores, 985 F.2d 770,783 (5th Cir. 1993). Other courts, while not applying a per se rule, have reversed convictions because a codefendant's post-arrest statement

to law enforcement officials was not "genuinely" against the declarant's penal interest.[5] Even those circuits holding that statements against interest fall within a "firmly rooted" hearsay exception have apparently limited that finding to situations in which the declarant did not directly inculpate the accused.[6] Accordingly, the State, as proponent of the challenged testimony, must overcome a substantial burden to justify the admissibility of San Martin's statement against Franqui.

The State claims that San Martin's statement was truly inculpatory simply because he did not attempt to minimize his own involvement in the charged offenses. That argument, however, ignores the circumstances in which that statement was made. See Wright, supra at 819. Those circumstances clearly establish the inherent

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5. See United States v. Hazelett, 32 F.3d 1313 (8th Cir. 1994) (after being arrested in possession of cocaine, declarant had "nothing to lose by implicating" the defendant. Id. at 1318.); United States v. Beydler, 120 F.3d 985 (9th Cir. 1997) (declarant was confronted by police about seriousness of offense); United States v. Costa, 31 F.3d 1073 (11th Cir. 1994) (same).

6. See United States v. Trenkler, 61 F.3d 45 (1st Cir. 1995); Neumann v. Rivers, 125 F.3d 315 (6th Cir. 1997).

unreliability of that statement.

San Martin confessed to his participation in the instant offenses on January 18, 1992. When questioned, he had already been in custody for several days pursuant to his arrest with the Respondent on unrelated charges.

On the day in question, San Martin initially confessed to having participated in an incident that resulted in the death of a police officer. [7] Later, he was "confronted" by the police about the instant charges. Specifically, the interrogating detective told him that he had been implicated in that offense "through the statements of others." (TR: 293-4) The detective also apprised San Martin of information that he had received from the detective who had questioned Franqui. (TR:2110) As San Martin had been arrested with the Respondent only several days before, he likely concluded that Mr. Franqui had "inculpated" him. His motivation to "shift or spread blame" or to "avenge himself" by implicating the Respondent is thus evident. Also, considering the seriousness of the offense, San Martin would undoubtedly wish to "curry favor" with the investigating detectives by inculpating others.

The Court need look no further than its decision in Lee to conclude that San Martin's statement was not genuinely against his penal interest. In Lee, the

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[7]. That case is the subject of this Court's case number 97-1202.

codefendant (Thomas) confessed only after he had been told that Lee had implicated him. When questioning Thomas, the police "no doubt knew what they were looking for," Id. at 544, as they had already questioned Lee. Thomas therefore had at least a "theoretical motive to distort the facts to Lee's detriment [.]" Id. His confession was thus inadmissible against Lee.[8]

A nearly identical situation exists here. Prior to questioning San Martin about this incident, the police told him that he had been implicated by others. San Martin had no reason to doubt that representation as the detectives confronted him with details of the case. Although the trial court found that his confession was voluntary, "such a finding does not bear on the question of whether the confession was also free from any desire, motive, or impulse [San Martin] may have had either to mitigate the appearance of his own culpability by spreading the blame or to overstate [Franqui's] involvement in retaliation for [the Respondent] having implicated him in the murder[]." Lee, supra at 544. San Martin's statement was thus not sufficiently reliable to justify admission into evidence as a statement against penal interest.

Significantly, in Lee, the Court declined to classify Thomas' confession as a

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[8]. See also Beydler, supra (although the declarant did not "trivialize his role or try to shift blame," an incentive to "curry favor" with the police remained. Id. at 988.).

"simple 'declaration against penal interest.'" Id. at 544 (ftnt.5). Instead, it viewed that statement as "a confession by an accomplice which incriminates a criminal defendant." Id. Other courts have used the same approach when considering a codefendant's statement that implicates the accused. See e.g., Flores, supra. Clearly, nothing about San Martin's confession suggests that a different analysis is appropriate here. Accordingly, the State has failed to satisfy its threshold burden of showing that that confession qualified as a statement against penal interest. As, in this respect, the instant case is essentially identical to Lee, review here should be denied.

B) **The circumstances in which the codefendant's confession was given do not suggest that that confession was reliable as the codefendant was clearly motivated to "avenge himself" by inculpating the Respondent.**

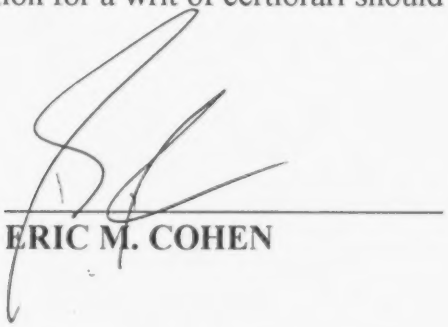
Alternatively, the State argues that San Martin's confession was admissible against Franqui because it exhibited "particularized guarantees of trustworthiness." Its argument, however, misapprehends the issue. The question is not, as the State suggests, whether the declarant "fully inculpates himself," Petition at p.18, but whether those portions of the declarant's statement that inculpate the accused are sufficiently reliable. As discussed above, San Martin's motives for revenge and to curry favor render his statements incriminating the Respondent unreliable, and thus inadmissible.

The State's argument relies almost exclusively on San Martin's failure to minimize his own involvement in the charged offenses. But, again, his complete admission of his own culpability does not negate his incentive to falsely implicate Franqui as revenge or as a ploy to better his own bargaining position with law enforcement. Further, the State's argument that the declarant's confession was voluntary was given little weight in Lee. Id. at 544. It merits no more attention here. Finally, consideration of the "interlocking" nature of the defendants' confessions would clearly run afoul of this Court's decision in Wright, supra. Accordingly, San Martin's statement lacked sufficient "particularized guarantees of trustworthiness" to

justify admission. As the inquiry into the reliability of that statement is fact-specific, it is not an issue that warrants review by this Court.

CONCLUSION

For the reasons argued above, the State's petition for a writ of certiorari should be denied.



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